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The state copyright conundrum

What's your state government's rule on copyright?

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U.S. copyright law has a unique place in the world regarding federal works and copyright. Federal copyright law states that “Copyright protection under this title is not available for any work of the United States Government.”¹ This is a broad and clear statement that works of the federal government are in the public domain and are free for use by all.

The copyright status of works of the state governments, however, is often far more difficult to determine. While reasonable policy would contend that state government works should be available to the public at large, many states assert a copyright interest in their materials, and, most concerning, many more lack any clear legal guidance on the issue. States often produce a variety of copyrighted works. Figuring out whether these state materials are copyrighted is a tricky question, and one that many librarians and archivists face from time to time.

Several years ago, one such state copyright conundrum arrived at my doorstep at just the right time. The question furthered a concept I had been toying with for years. The library community could benefit from the creation of an overall resource outlining the patchwork of state copyright laws. This would also give librarians, archivists, lawyers, and the public the ability to use this resource as an effective tool for advocacy and greater understanding of state copyright. The result was the State Copyright Resource Center.²

The original state copyright question emerged from Harvard's Graduate School of Design (GSD) Loeb Library, which was working to digitize a collection of unique state urban planning reports. These materials were housed in the library, representing the work of many states as they grappled with increased infrastructure, and a population with greater access to cars, trains, and buses. They were produced from the 1950s through the 1990s. Because they were unique and nearly unavailable, even from the states that created them, they had a potentially high scholarly value to GSD and other communities, and there was great interest in digitizing them.

As we started our research on state copyright, we realized that there was no overall resource on the law where states were or were not asserting copyright over their materials. Katie Zimmerman, now scholarly communications and licensing librarian at MIT, was serving as the copyright fellow for our office and agreed to work on researching the problem with us. The State Copyright Resource Center was developed with Zimmerman and several other contributors over the last three years to help identify the relevant laws in each

state.³ Again, this site focuses on the copyright of state publications, often referred to as “state government information” or “state government publications,” which include posters, surveys, pamphlets, flyers, photographs, and other materials created by the state. It does not address official “public records,” which a citizen has to make an official records request to access (for emails, memos, etc.), or the copyright status of state laws or standards that are written by third parties and then incorporated into law.⁴

For each state, the District of Columbia, and Puerto Rico, we’ve tried to identify the relevant laws and legal sources that affect the copyright status of government documents. We cover, in great detail, the copyright status in each state; any binding, on-point law, including cases, statutes, and regulations; various advisory sources and related laws; any state public records law; some state-specific examples; and an all-inclusive category of additional things to consider in each state. Plus, we have an overall research bibliography.

The section on copyright status is one of the most critical portions of the site. We assess the current copyright status of government documents in the state. We use color coding combined with a scoring system (see below for more on the “Openness Score”), where red indicates that documents are presumptively copyrightable, green indicates that documents are presumptively public domain, and other colors designate a scale between copyright and public domain, where the governing law is not clear.

Near the beginning of our investigation into state copyright status, two critical cases that came to opposite conclusions emerged, and we would rely on these cases to assess other states later in the project. In *County of Suffolk v. First Am. Real Estate Solutions*, a New York court examined alleged copyright infringement of tax map created by Suffolk County.⁵ The court examined the state public records law, the state Freedom of Information Law (FOIL),⁶ and concluded that the statute provides “no clear indication that the Legislature intended to abrogate a covered entity’s copyright.”⁷

As a result, the court concluded that state-owned copyright was consistent with FOIL, since FOIL requires state agencies to provide *access to records*, but does not address subsequent restrictions on the *recipient’s use* of those records.⁸

According to the court, FOIL requires agencies to make records available for personal use and fair use under federal copyright, but does not prohibit agencies from requiring licensing agreements for other uses.⁹

The structure of this analysis gave us a clue to how we might arrange some of the state-specific factors in the State Copyright Resource Center—the court’s research and analysis on the state public records law as possible nullifying the “presumption of copyright”—which was later followed by all subsequent courts examining the copyright status of state government documents.

On the other end of the spectrum, a Florida court in *Microdecisions v. Skinner* followed the same chain of reasoning as the *County of Suffolk*¹⁰ case, but came to the opposite conclusion. In Florida, the court placed a greater emphasis on the policy behind the public records law.¹¹ The facts of the case were also similar to those of *Suffolk*.

In *Microdecisions*, a county property appraiser sought to assert a copyright on behalf of the state in geographic information systems (GIS) maps created in his office.¹² The *Microdecisions* court examined the public records law to determine copyright status in Florida.¹³ The court noted both that access to public records is a value enshrined in the state constitution through the Sunshine Amendment, and that Florida has a long history of public records statutes stretching back to 1892.¹⁴ The court also noted the lack of restrictions placed on recipients of records under the public records law.¹⁵ Since the legislature enacted a system requiring robust public access to documents unless a specific exemption is authorized, the court reasoned, a state entity *cannot copyright public records unless they fall under an exemption*.¹⁶

This same pattern of reasoning used by the *County of Suffolk* and *Microdecisions* courts was followed in California and South Carolina. California came to the same conclusion as Florida, and South Carolina aligned themselves with the New York decision.¹⁷ This caselaw research then laid out a clear set of guidelines and factors for our team to assess each state status. Later, we would research each factor and then measure their

with basic scoring. As a result, we created the State Copyright Resource Center's "Openness Score."

The Openness Score (later named the Zimmerman-Courtney Openness Index) is a quantification of all the indicators we identified that a state will or will not assert a copyright interest in their public records. We calculated the score by quantifying the arguments and factors related to the copyright status of government documents in that state—the same arguments and factors we describe in each of the descriptions for each state. These factors are based on the courts' same factors when deciding the copyright status of government documents. The openness score is the z-score of that quantification. In other words, it measures the number of standard deviations a state is above or below the average across all states.

In some cases, the openness score will not match the listed copyright status. This occurs where there is controlling law on the copyright, but the underlying factors go in a different direction. This could mean that the dominant law would be overturned if examined by a court, or it could reflect a deliberate change of direction within the state government. The openness score is an attempt to measure probability within a murky legal landscape, and as such should not be taken as a guide to legal action. Obviously, where there is binding, on-point law on the subject, that law controls, and we identify that in each state's listing.

While SCRC serves a research-focused purpose, it also has served well in advocacy work across these states. An early partner of SCRC was the Free State Government Information (FSGI) network.¹⁸ Since meeting at ALA in 2015, I thought a partnership was advantageous to help further both organizations' missions: ensure the widest possible access and use of state government information.

FSGI was formed in 2012 by Bernadette Bartlett, Michigan documents librarian at the Library of Michigan; Kristina Eden, copyright review project manager, HathiTrust at the University of Michigan; and Kris Kasianovitch, state, local, and international government information librarian at the Stanford University Library. I joined the team in 2015 with the specific goal of enhancing both missions through collaborative work. FSGI will continue to be a partner in helping with the outreach necessary to develop, update, and improve SCRC.

I have used SCRC to help advocate directly to state legislatures about opening all copyrighted works to the public. It is amazing to observe the response from state officials when they see their state's low openness score on the Zimmerman-Courtney Index, followed up by a color code, which is often not green. Most often, they are entirely unaware of the problem. As a result, state legislatures, librarians, archivists, and state's attorneys have invited us to talk to various offices and representatives in order to encourage greater open access and use of state materials. Furthermore, the data and research gathered for this project has given me the ability to pitch various types of remedies to the "closed" copyright of state works.

Through workshops, invited talks, and activism we can suggest several options to get states out of SCRC's "red" and into "green" on the Zimmerman-Courtney openness score. For example, many states are completely unaware of the problem, and, since some have open codes of law, they see no harm in opening copyright to other state materials. Other states, however, may be reluctant to "give up" copyright. For those states we point to basic legislative solutions such as a Creative Commons license, which maintains copyright but opens up the materials for nearly unconstrained use. This is a route that the state of Virginia has recently adopted, using the CC-BY license.

Over the last two years, we have pitched draft legislation, executive orders, CC-BY-based policies, and other potential state tools to allow greater openness (or less copyright restrictions) to state government works. SCRC has been an anchor to visualize talking points when visiting state legislatures, and advocating directly to administrators, state librarians, legislators, and legislative counsel on this issue. The legislatures and state libraries continue to work with us and FSGI on adapting methods for better, and more accessible, open government, using copyright as a benefit, not a constraint.

Most recently our site was honored with a prestigious award, the 2018 American Association of Law Libraries (AALL) Public Access to Government Information Award. AALL President Greg Lambert stated, "Through [SCRC's] work and advocacy to ensure information about the copyright status and openness of state legal information, they create a multiplier effect that can inspire others to advocate for greater access to legal

information in the public domain. We applaud them for their efforts.”¹⁹ SCRC is a living document, designed to ensure the most current information is available. And we think not only will it aid questions about copyright and provide others that are grappling with similar issues with information about the copyright status of state works, but it will also continue to serve as an effective tool of advocacy for state copyright reform.

If you want to be involved with SCRC, feel free to email me. We are always looking for champions in each state for copyright and open government materials.

Notes

1. 17 U.S.C. § 105.
2. State Copyright Resource Center, <http://copyright.lib.harvard.edu/states/> (<http://copyright.lib.harvard.edu/states/>).
3. Many thanks to the previous OSC Copyright Fellows including Saptarishi Bandopadhyay, Leigh Barnwell, Jessica Vosgerchian, and OSC staff members Ben Steinberg and Emily Kilcer.
4. Again, the State Copyright Resource Center does not cover the copyright status of state laws or standards that are written by third parties and then incorporated into law. This is a very active area of law, with multiple decision and several court cases pending.
5. *Cnty. of Suffolk, New York v. First Am. Real Estate Solutions*, 261 F.3d 179, 184 (2d Cir. 2001).
6. N.Y. Pub. Off. Law § 84, et seq.
7. *Cnty. of Suffolk, New York v. First Am. Real Estate Solutions*, 261 F.3d at 188.
8. *Id.* at 192.
9. *Id.* at 193.
10. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 875 (Fla. Dist. Ct. App. 2004)
11. *Id.* at 875.
12. *Id.* at 873.
13. *Id.* at 874-75.
14. *Id.* at 875.
15. *Id.*
16. *Id.* at 876.
17. *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1335 (2009); *Seago v. Horry County*, 378 S.C. 414, 423 (2008).
18. Free State Government Information, <http://stategov.freegovinfo.info/> (<http://stategov.freegovinfo.info/>).
19. American Association of Law Libraries, “AALL Announces the 2018 Public Access to Government Information Award Winner” (2018) available at https://www.aallnet.org/wp-content/uploads/2018/05/PR_052918_AALL-ANNOUNCES-2018-PUBLIC-ACCESS-TO-GOVERNMENT-INFORMATION-AWARD-WINNER.pdf (https://www.aallnet.org/wp-content/uploads/2018/05/PR_052918_AALL-ANNOUNCES-2018-PUBLIC-ACCESS-TO-GOVERNMENT-INFORMATION-AWARD-WINNER.pdf).